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IN THE

Supreme Court of the United States

October Term, 1970.

No. 608

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner Leo F. Baum respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 2, 1970.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Findings of Fact and Conclusions of Law, the Order Denying Plaintiff's Motion to Amend and Supplement the Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the Middle District of Florida-Jacksonville Division also appear in the Appendix hereto. They are not reported.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 2, 1970. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does the Public Vessels Act, 46 U. S. C. § 781, and federal maritime law, or does the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b) and 2674, and the law of the place where wrongful act or omission occurred, determine the liability and duties of the United States as a shipowner for the negligence of its marine surveyor where he had actual knowledge that the shipyard-contractor was using obviously dangerous makeshift hoisting containers to lift debris from the hold of the government's vessel and failed to exercise his authority and powers to forbid the dangerous practice or to require the shipyard-contractor to use safe hoisting containers or to erect reasonable safeguards to protect other workers from falling containers although he had ample opportunity to do so prior to petitioner's accident?

2. Does the United States as a shipowner owe a duty to provide a safe place to work for shipyard workers aboard its vessel while in a floating drydock on a navigable river, especially where its agent aboard the vessel knows that the shipyard contractor is performing contracted work upon the vessel with obviously dangerous makeshift tools or equipment and that agent has full authority to compel the shipyard to use safe methods and equipment and to exercise care so as to provide the shipyard workers on the vessel with a safe place to work?

3. Did the Court of Appeals err in enlarging the application of *West v. United States*, 361 U. S. 118 (1959) to relieve shipowners from their continuing duty to exercise reasonable care to provide a safe place to work for employees of shipyard-contractors aboard their ships in cases where the employee was *not* injured by the very item the contractor was hired to repair but was injured by the contractor's unnecessary use of dangerous makeshift tools with the shipowner's knowledge and implicit consent.

4. Has petitioner, a permanently totally disabled shipyard worker, been deprived of his right to recover without due process of law in violation of the Fifth Amendment where the Court of Appeals sustained the District Court's adverse decision only by declaring that there was no evidence that defendant's marine surveyor had knowledge of any dangerous defect, when in fact the record was redundant with clear, uncontradicted admissions that the surveyor knew, prior to petitioner's accident that the independent contractor's employees were using flimsy discarded paint cans as hoisting containers, one of which ultimately caused petitioner's injuries?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 46:

> § 781. Libel in admiralty against or impleader of United States
>
> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920. Mar. 3, 1925, c. 428, § 1, 43 Stat. 1112.

United States Code, Title 28:

> § 1346. United States as defendant
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United

States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked because the defendant was the United States of America and the plaintiff's cause of action was based upon the Public Vessels Act and Suits in Admiralty Act.

Leo F. Baum, petitioner, was a 44 year old shipyard machinist who was permanently and totally disabled by an accident on January 10, 1967 while working aboard the S. S. Cape San Martin, a vessel owned by the United States Maritime Administration which was undergoing extensive repairs in a floating drydock upon the St. John's River at the Jacksonville Shipyards, Jacksonville, Florida, incidental to reactivation from the moth ball fleet (A. 284). A separate crew of workmen of Jacksonville Shipyards, Inc. were hoisting debris from the hold of this vessel near the spot where Baum was required to work (A. 187, 160-164). They were using discarded five-gallon paint cans with flimsy wire handles as hoisting containers (A. 82-83, 89, 95, 161, 165-166, 179-180, 187-190, 192-193, 212). The accident occurred when the wire handle of a can pulled out of its sockets on the sides of the can and the can, loaded with debris, dropped ten to fifteen feet and struck Baum's head (A. 194).

Jackson B. Springs was the United States Maritime Administration's marine surveyor[1] aboard the ship whose job was to supervise the performance of the contract of repair by Baum's employer, Jacksonville Shipyards, Inc. (A. 57, 102, 285). He was on the S. S. Cape San Martin

1. The word "surveyor" in this context is equivalent to "superintendent; overseer, supervisor, or the like". Webster's New International Dictionary (2d Ed., 1950).

about eight hours every day that the work was being performed and went wherever work was being done on the ship (A. 74-82, 107). In his testimony, he admitted that prior to Baum's accident, he knew that the clean-up crews of the shipyard were using discarded paint cans to haul debris from the hold (A. 82-84, 89, 123). Other witnesses testified that there had been prior incidents of cans dropping because of handles pulling out of the sides of such cans (A. 187-188) and that the shipyard workers had been complaining about this use of these paint cans for a period of three years before Baum's accident to their supervisors (A. 198-200, 209-210) and to the International Brotherhood of Boilermakers, Iron Ship Builders, etc., AFL-CIO (A. 231-235, 241-242, 244). Springs necessarily knew then of this danger. He knew that in this trade hoisting containers were generally used for this shipboard work which were constructed with heavier handles and were more securely fastened to the bucket (A. 91-92). But he failed to fulfill his duties. Although he recognized that he was required to be aboard the ship to supervise the shipyard's performance of the contract and that he was required to enforce every provision thereof, he concerned himself only with preserving the safety of the ship, not the safety of the shipyard workers upon the ship (A. 115, 118). But, when confronted with Article 9[2] of the contract, he conceded that he should have required the shipyard to comply with that provision of the contract, also (A. 121).

Furthermore, the government had admitted in its answers to plaintiff's interrogatories that its surveyor was

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2. ARTICLE 9. *Indemnity and Insurance:*

(a) *The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees,* persons and property in and about the work, and to the vessel or portion thereof upon which work is done. (Supp. A. 20).

required to ensure that the contractor discharged his responsibilities for the safety of the workers under Article 4 of the contract of repair.[3] In those same answers, the United States admitted that its surveyor had the authority "to deal with the contractor's supervisor" when departures from the responsibilities placed upon the contractor by Article 4 were noted and Springs, in his testimony, ad-

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3. Defendant's Answer to Plaintiff's Interrogatory No. 8 (Supp. A. 1, 34). The contract provided:

ARTICLE 4. *Workmanship and Inspection:*

(a) Unless otherwise specifically provided in the job order *all workmanship, equipment, materials and articles, and all operational practices of the Contractor* used in the performance of the work, shall be the best commercial marine practice and shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies in accordance with the rules of said regulatory bodies. (Supp. A. 18)

(c) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the [Director, National Shipping] Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense. (Supp. A. 12, 19)

(d) At the request of the authorized representative of the [Director, National Shipping] Authority the Contractor shall place *reasonable safeguards* and shall put and keep at all time sufficient lights *to prevent accidents in spaces and areas in which the Contractor will be required to perform or has started work* and to provide safe access and egress to and from the vessel. (Supp. A. 12, 20)

(k) The United States shall have the right at any time and from time to time to furnish materials, supplies, tools, equipment, plans, drawings, and facilities or services (except services which the Contractor itself is ready, able and willing to furnish) for use upon or in connection with work under a job order under this contract, and title [*sic*] thereto shall at all times remain in the United States. (Supp. A. 22)

mitted that he had full authority to enforce the safety requirements of the contract (A. 102-106).[4] Yet, Springs did not stop the shipyard when it used discarded paint cans for hoisting, (A. 103); nor did he demand the erection of safeguards, such as simple sheets of plywood as ceilings to protect the workers below (A. 104-105). He did nothing, although he had ample authority and power under the contract and the duty to render the ship a safe place to work. He knew of this use of dangerous tools and equipment, and had ample opportunity to exercise his authority and power prior to Baum's accident, but neglected to do so (A. 102-104).

All of the foregoing uncontradicted admissions of the government and its marine surveyor were admitted in evidence at the trial before the District Court (A. 279-282). Nevertheless, the District Court ignored these

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4 Defendant's Answer to Plaintiff's Interrogatory No. 9 (Supp. A. 1, 4). Also, the contract provided:

ARTICLE 26. *Default:*

(a) The United States may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor, terminate the whole or any part of the work covered by a job order in any one of the following circumstances:

* * *

(2) If the Contractor fails to perform *any of the other provisions of this contract* or the job order issued hereunder, or so fails to make progress as to endanger performance of the job order in accordance with its terms. (Supp. A. 40)

ARTICLE 27. *Disputes:*

All disputes concerning questions of fact or of interpretations which may arise under any job order, and under this contract, which are not disposed of by mutual agreement, shall be decided by the authorized representative of the [Director, National Shipping] Authority who shall reduce his decision to writing and mail a copy to the Contractor at its regular place of business. (Supp. A. 12, 42) (Emphases supplied.)

crucial facts[5] and entered judgment against petitioner. It gratuitously declared that the "Good Samaritan Rule", a theory which none of the parties had advanced or argued, was not applicable to this case. The District Court cited and followed *Roberson v. United States*, 382 F. 2d 714 (C. A. 9, 1967), a case under the Federal Tort Claims Act which none of the parties had cited. *The determinative effect of the admissions of knowledge on the part of the defendant's surveyor were ignored by the trial judge* (A. 395-401, 417-418). Therefore, petitioner filed a motion asking the District Court to take cognizance of those admissions and to amend and supplement the Court's findings of fact and conclusions of law and to vacate its judgment in favor of the defendant.[6] The motion was summarily denied upon briefs without argument and judgment was entered in favor of the United States as defendant against petitioner, and as third-party plaintiff against Jacksonville Shipyards, Inc., third-party defendant, for indemnification of counsel fees. There was no action or proceeding between plaintiff and Jacksonville Shipyards, Inc. (A. 349-356, 14-15).

Petitioner then appealed to the Court of Appeals. That Court agreed that the *Roberson* decision did not "squarely answer the questions presented in the case at bar".[7] The Court held that the fact that "the property owned by the government here is a sea-going vessel does

5. At trial, the Court's attention had been directed to the subject admissions by the defendant in plaintiff's trial brief, at pp. 2, 6, 8, 10 and 12. In addition, plaintiff called these admissions to the trial court's attention in argument upon defendant's motion for dismissal, (A. 293-294), plaintiff's motion for a directed verdict on liability, (A. 347-348), and in his summation, (A. 365-367).

6. Plaintiff's Motion, paragraphs 5 and 10. (A. 407-408, 414-415).

7. Page 6 of the opinion.

not differentiate this case from similar cases under the Federal Tort Claims Act",[8] nor did the fact that this action was brought under the Suits in Admiralty Act and the Public Vessels Act, "and their concomitant admiralty law". In this we respectfully submit the Court committed grave fundamental error.

While the Court of Appeals conceded that even under the law of Florida there was an exception to the general rule which would have permitted petitioner to recover, it declared that the essential fact which would have supported application of that exception to this case, namely, knowledge of the marine surveyor of the dangerous conditions, was not in evidence here.[9] Thus, the Court of Appeals closed its eyes to the admitted facts of this case and ignored petitioner's basic assignment of error on the part of the District Court, namely, its failure to amend its findings of fact and conclusions of law pursuant to plaintiff's motion to reflect the admissions of knowledge of the government's surveyor of the use of dangerous makeshift tools or equipment for an ample time prior to petitioner's accident. Yet, the presence of these admissions in the evidence was set forth at pages 7, 15 and 18 of petitioner's brief, as well as in the transcript of the trial and plaintiff's motion for

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8. Page 7 of the opinion.

9. Specifically, the opinion reads as follows at p. 7:

> Nor does the relationship between the parties here (contractee-contractor) give rise to the imposition of a duty on the Government. It is well settled "that a contractee is generally not liable for the torts of an independent contractor or of the latter's servants". *Roberson, supra; Kirk, supra;* 41 Am. Jur. 2d, *Independent Contractors*, § 24 (1968).[3]

3. An exception to this general rule rises, of course, when the contractor has knowledge of a dangerous condition created by the independent contractor. *Emelcon, Inc. v. United States*, 5 Cir., 1968, 391 F. 2d 9. *However, there is no evidence here that the government inspector had knowledge of any dangerous defect.* [Italics supplied]

amendment of the findings of fact which had been included in the appendix thereto. There were also references to these admissions in the brief of Jacksonville Shipyards, Inc.[10] There is no ascertainable excuse for the erroneous conclusion of the Court of Appeals that these facts were not present in this case. Having read these admitted facts out of the record, the Court of Appeals affirmed the judgment of the District Court on June 2, 1970.

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10. At pages 2-3, 5, 14 and 19 of that brief.

REASONS FOR GRANTING THE WRIT.

1. This Court Should Exercise Its Power of Supervision to Correct the Lower Court's Refusal to Consider the Uncontradicted Evidence Which Revealed That the Shipowner Knew of the Shipyard-Contractor's Negligence, Had the Power to Control the Shipyard and the Work Being Done on Its Vessel and Had a Non-Delegable and Continuing Duty to Provide a Safe Place to Work.

In *West v. United States*, 361 U. S. 118 (1959), this court recognized that there is a duty to furnish a safe place to work which is non-delegable on the part of a shipowner where he has the power either to supervise or to control the repair work in which an employee of a contractor is engaged. In this case, the evidence is uncontradicted that this was so. Nonetheless, the learned trial judge and the Court of Appeals ignored reams of uncontradicted testimony and admissions to that effect and stated that the government representative on the vessel had no power of control over the work. The effect of this ruling is that it deprived the petitioner of his right to recover in violation of due process of law.

In *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523 (1832), this court declared that unrebutted *prima facie* evidence could not be disregarded:

> "What is prima facie evidence of a fact? It is such as in judgment of law, is sufficient to establish the fact: and, if not rebutted, remains sufficient for the purpose. The jury is bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would

hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such prima facie evidence in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject."[11]

Here, the marine surveyor assigned by the United States Maritime Administration to the S. S. Cape San Martin as the defendant's authorized representative under the contract during the period of the repairs testified that he knew, prior to petitioner's accident, that the shipyard was using makeshift hoisting containers of flimsy construction aboard the vessel. He admitted that he had the power and authority to forbid their use. His testimony was not denied, contradicted, rebutted nor explained away. The testimony pertained to knowledge he acquired while acting within the course and scope of his authority and employ-

11. See also, *Browning v. Crouse*, 356 F. 2d 178, 180 (C. A. 10, 1966); *Potucek v. Cordeleria Lourdes*, 310 F. 2d 527, 531 (C. A. 10, 1962) certiorari denied 372 U. S. 930; *Burns v. Fisher*, 152 Mont. 26, 313 P. 2d 1044, 67 A. L. R. 2d 1 (1957); *Nicholas v. Davis*, 204 F. 2d 200, 202 (C. A. 10, 1953); *Stone v. Stone*, 136 F. 2d 761, 764 (C. A. D. C. 1943). In *George v. Capitol Traction Co.*, 295 F. 965, 968 (C. A. D. C. 1924), the court said: "But where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen. Kelly v. Jackson, 6 Pet. 622, 631, 8 L. Ed. 523."

ment.[12] The defendant did not object to its admission in evidence (A. 279-280). Therefore, the surveyor's testimony was the equivalent of judicial admissions conclusively establishing the facts admitted.[13] Yet, in the face of these admissions, the Court of Appeals declared that in this record there was "*no evidence*" that the marine surveyor of the defendant had knowledge of any dangerous defect or condition created by the independent contractor, and therefore refused to apply its decision in *Emelwon, Inc. v. United States*, 391 F. 2d 9 (C. A. 5, 1968) to petitioner's case, thereby precluding his recovery. Yet, because of the admissions of knowledge on the part of the defendant's surveyor, petitioner's case was squarely within the *Emelwon* exception to the general rule.[14] Furthermore, under the federal maritime law, which should have governed the decision of this case, actual or constructive knowledge of the

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12. Wigmore, Evidence (3d Ed. and 1964 Pocket Supp.) §§ 1069, 1078; *Cf. Pekellis v. Transcontinental & Western Air*, 187 F. 2d 122, 128-129 (C. A. 2, 1951); *Dressel v. Parr Cement Co.*, 80 Cal. App. 2d 536, 181 P. 2d 962 (1947); *Jones v. Raney Chevrolet Co.*, 217 N. C. 693, 9 S. E. 2d 395 (1940).

13. *Cf. Hercules Power Co. v. Costa*, 289 F. 2d 571 (C. A. 5, 1961) (knowledge admitted); *Bolam v. Louisville & N. R. Co.*, 295 F. 2d 809, 811-812 (C. A. 6, 1961); *Kansas Transport Co. v. Browning*, 219 F. 2d 890 (C. A. 10, 1955); *Ercoli v. U. S.*, 131 F. 2d 354, 357 (C. A. D. C., 1942); *Schoenbaechler v. Louisville Taxicab & T. Co.*, 328 S. W. 2d 514 (Ky., 1959) (pre-trial deposition testimony of plaintiff held judicial admission of contributory negligence); *Taylor v. Jacobson*, 336 Mass. 709, 147 N. E. 2d 770, 775 (1958) (admission of knowledge); *Zamora v. Thompson*, 250 S. W. 2d 626, 628 (Tex. Civ. App., 1952) (admission of knowledge); *Scalock v. Hockley*, 186 Md. 49, 45 A. 2d 744, 746 (1946); Wigmore, Evidence (3d Ed. and 1964 Pocket Supplement) § 2594a; *Security Nat. Bank v. Johnson*, 195 Okla. 107, 155 P. 2d 249, 169 ALR 790 and Anno., 169 ALR 798; *Kanopka v. Kanopka*, 113 Conn. 30, 154 A. 144, 80 ALR 619 (1931) and Anno., 80 ALR 624.

14. See, also, *Pears v. Florida Publ. Co.*, 132 So. 2d 561 (Fla., 1961); *Jamison v. A. M. Byers Co.*, 330 F. 2d 657 (C. A. 3, 1964); *Quinones v. Twp. of Upper Moreland*, 293 F. 2d 237 (C. A. 3, 1961); *Spinozzi v. E. J. Lavino & Company*, 243 F. 2d 80 (C. A. 3, 1957); Restatement, Torts, § 344, Comment *b*.

shipowner of facts which made its ship an unsafe place to work was the cornerstone upon which liability was founded in *Albanese v. N. V. Nederl Amerik Stoomv. Maats*, 382 U. S. 283 (1965) and *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959) and many other cases.[15] *A fortiori*, the Court of Appeals should have reversed the judgment and orders of the District Court in light of the actual facts of this case. But, because of their failure to take cognizance of those facts, both the District Court and the Court of Appeals failed to deal with the issue before them, and thereby deprived petitioner of his cause of action without due process of law. It is imperative that this Court issue certiorari in exercise of its powers of supervision to prevent such a manifest miscarriage of justice.

In this case, the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this court of its power of supervision to prevent a deprivation of petitioner's property without due process of law.

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15. *Halecki v. United N. Y. & N. J. Sandy Hook Pilots Ass'n.*, 302 F. 2d 840, 841 (C. A. 2, 1962) (carbon tetrachloride was known to be dangerous); *Lettsome v. United States*, 411 F. 2d 917 (C. A. 5, 1969); *Aldridge v. States Marine Corporation of Delaware*, 265 F. 2d 554, 557 (C. A. 9, 1959); *La Capria v. Compagnie Maritime Belge*, 286 F. Supp. 980 (S. D. N. Y., 1968) (defendant had actual knowledge or ample time to observe dangerous practice); *Mendoza v. A/S J. Ludwig Mowinckels Rederi*, 293 F. Supp. 1319, 1322 (S. D. N. Y., 1968); *Casbon v. Stockard Steamship Corp.*, 173 F. Supp. 845, 847 (E. D. La., 1959) ("respondent was, or should have been, aware of the practice"), at p. 849 ("Long-accepted practices are very often unsafe practices which are discontinued only after their character as such has been demonstrated by accidents"); *Kissinger v. United States*, 176 F. Supp. 828, 833 (E. D. N. Y., 1958) ("a hazard of which the Master must or should have had knowledge").

2. The Decision Below Conflicts With Other Decisions of This Court and With Decisions of Other Courts of Appeals.

The Fifth Circuit refused to apply the federal maritime principle that a shipowner is under a continuing duty to provide the employees of its independent contractor with a safe place to work.[16] Instead, it enlarged the exception to that duty announced in *West v. United States*, 361 U. S. 118 (1969) to include its erroneous conception of the facts of petitioner's case. In *West*, a repairman was injured by a metal plug which blew off of a water line. The defective water line and plug had been listed in the specifications of his employer's repair contract for repairing and replacement. This Court said, at p. 193:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent * * * was under no duty to protect petitioner from risks which were inherent in the carrying out of the contract." [17]

Here, the shipowner's surveyor had actual knowledge of the patently dangerous practice. The use of flimsy paint cans was not compelled by the nature of the work contracted

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16. *Albanese v. N. V. Nederl Amerik. Stoom v. Maats*, 382 U. S. 283 (1965); *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959); *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959); *White v. United States*, 400 F. 2d 74, 76 (1968); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636, 639 (1968); *Aldridge v. States Marine Corporation of Delaware*, 265 F. 2d 554, 577 (C. A. 9, 1959); *Kuhn v. P. J. Carlin Constr. Co., Inc.*, 134 Misc. 892, 278 N. Y. C. 635 (1935).

17. The opinion cites *Filipek v. Moore-McCormack Lines, Inc.*, 258 F. 2d 734 (C. A. 2, 1958).

to be done. Here, the admitted function of the government's marine surveyor was to affirmatively supervise the work and to enforce the contract of repair, which included his duty to ensure that the contractor discharged its responsibilities under Article 4 of the contract for the safety of the workers, as admitted in Defendant's Answer to Plaintiff's Interrogatory No. 8 (Supp. A. 1, 4) and its surveyor's testimony (A. 102-106, 121). It is utterly unrealistic as well as contrary to the government's admissions and the contract itself to assert that the government's representative lacked the right and the power to forbid the dangerous practice and to require safer equipment or safeguards.[18] Yet, the lower court declared, at p. 10 of its opinion:

> "The record indicates that the Government had relinquished control of the vessel. The Government was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same."

The Court below refused to accept the fact that petitioner had *not* been injured by the very defect which the shipyard had been hired to repair as a ground for distinguishing his case from the *West* decision. It said, at p. 9 of its opinion:

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18. Not only did the marine surveyor and the U. S. Maritime Administration have the power to require safe tools and equipment under the contract and to stop the work, if necessary, but Congress had charged the Department of Labor with the responsibility of enforcing § 41 of the Longshoremen's and Harbor Workers' Compensation Act, which requires employers to provide safe places to work "with particular reference to equipment used by and working conditions established by such employers" and had given it full power to do so through injunctions and criminal sanctions. 33 U. S. C. § 941. Therefore, the government had powers not available to the ordinary private shipowner, if it wished to invoke them.

> "Whether the actual injury is caused by the object being repaired or by other work being done in the vicinity is not cause for distinction where the risk is equally present in both situations. In both, the repair work creates the unsafe condition."

It failed to appreciate that petitioner's injuries were not caused "by other work being done in the vicinity" but by the unnecessarily dangerous implements which the shipowner knew were being used to do that work. The repair work contracted for did not create the unsafe condition—the long-continued known dangerous practice of hoisting debris in discarded paint cans did.

The Fifth Circuit's enlargement of the *West* exception to include extraordinary dangers unnecessary to performance of the repair contract conflicts with the Fourth Circuit decisions in *White v. United States*, 400 F. 2d 74, 76 (1968) and *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636, 639 (1968) which limited *West* to its special facts and seemingly departs from its own prior analysis of *West* in its decision in *Stark v. United States*, 413 F. 2d 253, 254 (C. A. 5, 1969).[19]

In *Van Horn*, the Fourth Circuit stated the duty of a shipowner, as follows, at 388 F. 2d 638:

> "On the basis of *Kermarec* and *Halecki*, we hold that federal maritime law, which of course governs this tort action that arose on navigable waters, requires that a shipowner *who delivers his vessel to drydock* exercise due care under all the circumstances to provide a reasonably safe place to work for those who foresee-

19. *Cf. Lettsome v. United States*, 411 F. 2d 917, 922 (C. A. 5, 1969) citing *Filipek*, but not *West*. The Fourth Circuit's decisions appear to be correct, because in *West* this Court relied upon the *Filipek* case where the Second Circuit had also found the same exception to the subject rule, limited to the situation where the very item being repaired created the danger.

ably will come aboard to service the vessel. See Olah v. The S. S. Juladurga, 343 F. 2d 457 (4th Cir. 1965); see also Norris, The Law of Maritime Personal Injuries, § 38 (1959).[20] [Italics supplied.]

The Fifth Circuit, however, held that there was no difference between the duties imposed by state law upon owners of property and the duties imposed by federal maritime law upon shipowners. Opinion, p. 7. It then relied upon Federal Tort Claims Act decisions,[21] to support its conclusion that the shipowner here did not owe a duty to petitioner to provide him with a safe place to work.[22] These

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20. *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959); *United N. Y. & N. J. Sandy Hook Pilots Ass'n. v. Halecki*, 358 U. S. 613, 618-619 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953); *Cf. Ira S. Bushey & Sons, Inc. v. United States*, 398 F. 2d 167 (C. A. 2, 1968).

21. *Roberson v. United States*, 382 F. 2d 714 (C. A. 9, 1967); *United States v. Page*, 350 F. 2d 28 (C. A. 10, 1965); *Kirk v. United States*, 270 F. 2d 110 (C. A. 9, 1959); *Hodge v. United States*, M. D. Ga. 1969, — F. Supp. — [No. 2238, Feb., 1969], aff'd — F. 2d —; *Market Ins. Co. v. Killon*, — F. 2d — (C. A. 5, 1969) [No. 26, 410, Sept. 8, 1969]. The foregoing decisions in which the plaintiff sought to impose liability upon the government because of inadequate inspection and supervision pursuant to its contract rights are irrelevant to this case because here the government's supervisor admitted that he knew of the practice which caused the injury for a substantial period of time prior to the injury. The maritime cases of *Filipek v. Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 736-737 (C. A. 2, 1958) and *Gallagher v. United States*, 206 F. 2d 177 (C. A. 2, 1953) were also cited, but should have been distinguished from the present case as indicated in the text, *infra*.

22. In *Kermarec, supra*, this court said "For the admiralty law at this late date to import such conceptual distinctions [of the common law] would be foreign to its traditions of simplicity and practicality. The Lottawanna, 21 Wall. 558, at page 575, 22 L. Ed. 654. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea. We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests, the duty of exercising reasonable care under the circumstances of each case." 358 U. S. 625, 630.

cases are not in accord with maritime law and the two maritime cases cited are distinguishable from the present case. In *Filipek*, the shipowner was absolved because there was insufficient evidence as to whether it was chargeable with knowledge of a latent defect which a reasonable inspection would not show and, as in the *West* case, the injury there was caused during the testing operation by the very object the contractor was hired to test. Similarly, in *Gallagher*, it does not appear that the shipowner had knowledge of the dangerous practice of the stevedore and it was *stipulated* by the parties that the shipowner did not supervise the stevedoring activities.

As a result of its analysis of the Federal Tort Claims Act decisions, the Fifth Circuit stated that the circumstances of this case did not give rise to the imposition upon the United States of a duty toward plaintiff as an employee of its independent contractor. It said, at pages 6-7 of its opinion:

> "In reaching this conclusion, the following relevant factors are considered, seriatim: what law is applicable; the relationship between the parties; the terms of the contract; the acts of the parties regardless of the contract; who had control of the vessel, the work area, and the safety program; the nature of the risk involved; and when was the risk created."

The most important factor was not among the factors listed—to wit, the shipowner's actual knowledge of the inadequate and dangerous instrumentality. This omission conflicts with this Court's holding in *Albanese*,[23] where constructive knowledge as opposed to actual knowledge was held sufficient to impose such a duty, and *Halecki*,[24] where

23. *Supra*, p. 14.

24. *Supra*, p. 14, footnote 15. Its decision also conflicted with the other decisions cited in footnote 15.

common knowledge that carbon tetrachloride was dangerous to human life was held to give rise to the duty. This portion of the Court's decision also conflicts with the decision of the Ninth Circuit in *Aldridge v. State Marine Corporation of Delaware*, 265 F. 2d 554, 556-557 (C. A. 9, 1959), which reversed the lower court's dismissal of the plaintiff's complaint in an action based upon negligence only, citing *Halecki* and stating:

> "Had the facts here been developed through a pre-trial conference, or on trial, the degree of knowledge which the ship's officers had, after they refused further to furnish the carpenter and his hammers, that a less safe method was in use, would have been made apparent for evaluation by the judge and jury."

A shipowner possessing knowledge of its contractor's dangerous methods and practices and having sufficient opportunity and power to prevent their use should be held liable to the contractor's employees who may be injured by such practices if the shipowner fails to exercise its right and powers to eliminate the danger.

As the Second Circuit said in *Gallagher*, at p. 179:

> "Where power is reserved by one who has hired an independent contractor to direct or control the contractor, an affirmative duty arises to exercise that power with reasonable care. Restatement, Torts § 414. The duty is co-extensive with the power."

Reservation of the right and power to control the contractor is equivalent to reservation of control over the ship. When such power is coupled with actual knowledge of the danger in time to avoid accidents, the shipowner also has control over the circumstances. The law should motivate shipowners to exercise control over their contractors to prevent

accidents from known dangerous practices by the imposition of a duty commensurate with their contractual powers. Such a duty promotes safety on ships—limiting responsibility to the contractor alone correspondingly limits the promotion of safety. The imposition of such a duty is consonant with "the humane and liberal character of proceedings in admiralty to give than to withhold the remedy when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 Fed. Cas. 909, 921 (No. 12,578) (C. C. D. Md., 1867), quoted in *Moragne v. States Marine Lines, Inc.*, 38 L. W. 4498 at 4502 (S. Ct., 1970).

It is respectfully submitted that this Court is justified in granting certiorari to resolve and clarify the maritime law governing the circumstances of this case, in addition to rectifying the injustice petitioner has suffered by reason of the errors of the lower courts.

CONCLUSION.

In this case, as distinguished from *West*, the evidence was overwhelming that the United States did have control or the right to control the operations of the shipyard-contractor and the ship during the repair work and, therefore, was under a duty to exercise reasonable care to provide the shipyard workers with a safe place to work. Even if this were not so, the Court of Appeals conceded that if the government's marine surveyor had knowledge of the dangerous conditions created by the dangerous practices of the contractor, then the United States would be liable to petitioner for such negligence of its contractor. However, the Court of Appeals misread the record in this case and mistakenly concluded there was no evidence of such knowledge. In this, it was grossly in error *quod erat demonstrandum*.

Therefore, this court should issue a writ of certiorari in exercise of its general powers of supervision over admiralty law to prevent the permeation of incorrect principles of law and the unjust application of such errors of law to the facts of this case.

Respectfully submitted,

B. Nathaniel Richter,
121 South Broad Street—5th Floor,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No: 68-1-Civ-J

LEO F. BAUM,

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant and Third Party Plaintiff,

v.

JACKSONVILLE SHIPYARDS, INC.,
Third Party Defendant.

JUDGMENT.

In accordance with the Findings of Fact and Conclusions of Law entered in the above entitled cause, it is

ORDERED AND ADJUDGED:

1. Judgment is entered in favor of Defendant and Third Party Plaintiff, United States of America, against Plaintiff, Leo F. Baum, and this action is dismissed.

2. Judgment is entered for Defendant and Third Party Plaintiff, United States of America, against Third Party Defendant, Jacksonville Shipyards, Inc., in the amount of attorneys' fees expended in the defense of this claim.

ENTERED at Jacksonville, Florida, this 19 day of June, 1969.

WM. A. MCRAE, JR., *Judge*

Copies to counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 68-1-Civ-J

LEO F. BAUM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant and Third Party Plaintiff,

v.

JACKSONVILLE SHIPYARDS, INC.,

Third Party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This is a civil action of admiralty jurisdiction in which plaintiff Leo F. Baum (Baum) seeks damages for personal injuries allegedly sustained on board defendant's vessel, the SS CAPE SAN MARTIN on January 10, 1967. On the date of the alleged injury the aforesaid vessel was undergoing reactivation overhaul at the premises of third party defendant, Jacksonville Shipyards, Inc. (Jacksonville). Defendant, United States of America (United States), has impleaded Jacksonville under Rule 14 Fed. R. Civ. P. on the theory that any liability of United States to Baum was occasioned by Jacksonville's breach of its warranty of workmanlike service. After having heard the evidence and considering the law, the Court makes the following:

FINDINGS OF FACT.

1. Baum is a citizen and resident of the State of Florida, residing at 6227 Ned Drive, Jacksonville.

2. The SS CAPE SAN MARTIN is a steam screw vessel owned as a Public Vessel by United States.

3. On January 10, 1967, Baum was employed by Jacksonville, as an outside machinist, for the performance of certain work aboard the SS CAPE SAN MARTIN while said vessel was located on a floating drydock on the St. Johns River at Jacksonville's shipyard.

4. On January 10, 1967, the SS CAPE SAN MARTIN was undergoing a reactivation overhaul pursuant to a contract between United States and Jacksonville.

5. On that date, Baum was engaged in removing valves on the evaporator in the area of the main condenser under the engine room of the ship and was struck in the head by a paint bucket containing miscellaneous hardware and other debris which was being raised by a block and tackle operated by other employees of Jacksonville.

6. Neither the bucket which struck Baum, nor the block and tackle being used to raise and lower it, were owned or provided by United States.

7. Any injuries suffered by Baum as a result of having been struck on the head by the bucket were occasioned solely as the result of acts of employees of Jacksonville.

8. No employee or other person for whom United States is responsible participated in any way in the acts which occasioned Baum's injuries.

9. Jacksonville is a Florida corporation with a place of business at Jacksonville, Florida, which, at all material

times, represented itself as a skilled expert and professional repair contractor.

10. The only United States employee in any way involved with the work during which Baum's injuries occurred was a Maritime Administration surveyor.

11. Under the contract between Jacksonville and United States, the following rights were given United States with respect to the workmanship and occupational practices of the contract used in the performance of the repair work on the SS CAPE SAN MARTIN (Contract Article 4(a), (c), (f), and (k), p. 7-9, 11):

> (a) Unless otherwise specifically provided in the job order all workmanship, equipment, materials, and articles, and all operational practices of the Contractor used in the performance of the work, shall be the best commercial marine practice and shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies.
>
> (c) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense.
>
> (f) At the request of the authorized representative of the Authority the Contractor shall place reasonable safeguards and shall put and keep at all time sufficient lights to prevent accidents in spaces and areas in which

the Contractor will be required to perform or has started work and to provide safe access and egress to and from the vessel.

(k) The United States shall have the right at any time and from time to time to furnish materials, supplies, tools, equipment, plans, drawings, and facilities or services (except services which the Contractor itself is ready, able and willing to furnish) for use upon or in connection with work under a job order under this contract, and title thereto shall at all times remain in the United States.

12. At no time did the United States' surveyor supervise or participate in the work which resulted in Baum's injury.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction over the parties and the subject matter of the action. The Court's jurisdiction of Baum's claim is pursuant to the provisions of the Public Vessels Act, as amended, 46 U. S. C. §§ 781-790.

2. A machinist injured while employed in repairing a vessel, work traditionally performed by the crew, is entitled to recovery for either negligence (on the part of the ship owner) or unseaworthiness, *West v. United States*, 361 U. S. 118 (1959). However, there can be no recovery for unseaworthiness if the vessel undergoing repairs has been withdrawn from navigation at the time of injury, and no recovery for negligence aboard a vessel withdrawn from navigation if the negligence consisted solely of acts done during the work of repair. *West v. United States, supra; Moye v. New Orleans Barge Lines, Inc.*, 402 F. 2d 238, 241 (5th Cir. 1968).

3. It was conceded by counsel for the parties, and it is the opinion of the Court, that Baum could not recover on the ground of unseaworthiness.

4. The rights of an employee of an independent contractor with respect to the United States are not expanded by rights of inspection afforded to the United States by provisions in the contract between the United States and the injured party's employer. These rights cannot become duties owed by the United States to an injured employee. *Roberson v. United States*, 382 F. 2d 714, 721 (9th Cir. 1967).

5. In the absence of a clear and express agreement to the contrary, *Capato v. Kheel*, 291 F. Supp. 804 (S. D. N. Y. 1968), there is an implied warranty of workmanlike service in a ship repair contract such as the one involved in this case. *H & H Ship Service Company v. Weyerhauser Line*, 382 F. 2d 711, 712 (9th Cir. 1967).

6. Since his injuries are solely traceable to acts of Jacksonville, Baum has failed to prove a cause of action against United States and is not entitled to any recovery from United States herein.

7. United States is entitled to recover from Jacksonville reasonable attorney's fees expended in the defense of Baum's claim. If the parties cannot agree to the amount of the recoverable attorney's fees, further proceedings will be had on this issue.

8. Judgment will be entered in favor of United States against Baum dismissing the action herein, and against Jacksonville in the amount of attorney's fees expended in the defense of this claim.

DATED this 3rd day of June, 1969.

WM. A. MCRAE, JR., *Judge*

Copies to counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 68-1-Civ-J

LEO F. BAUM,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant and Third Party Plaintiff,

v.

JACKSONVILLE SHIPYARDS, INC.,

Third Party Defendant.

ORDER.

Ordered:

Plaintiff's Motion to Amend and Supplement Findings of Fact, Conclusions of Law and Judgment is denied.

Done and Ordered at Jacksonville, Florida, this 5th day of August, 1969.

Original signed:
Wm. A. McRae, Jr.
Judge

Copies to counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 28615

LEO F. BAUM,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Third-Party Plaintiff-Appellee,

v.

JACKSONVILLE SHIPYARDS, INC.,

Third-Party Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(June 2, 1970)

Before GODBOLD, DYER and MORGAN, *Circuit Judges.*

MORGAN, *Circuit Judge:* This is a civil action in admiralty jurisdiction brought under the Suits in Admiralty Act, as amended, 46 U. S. C. §§ 741 et seq., and the Public Vessels Act, as amended, 46 U. S. C. §§ 781 et seq. The plaintiff was injured while working on board the drydocked ves-

sel, the SS CAPE SAN MARTIN, which is a steam-screw vessel owned by the defendant, United States of America (hereinafter the Government), and which was undergoing a reactivation overhaul in Jacksonville, Florida, pursuant to a contract between the Government and Jacksonville Shipyards, Inc. (hereinafter Jacksonville). The Government impleaded Jacksonville under Rule 14(c), Federal Rules of Civil Procedure, presumably on the theory that the liability of the Government, if any, was occasioned by Jacksonville's breach of its warranty of workmanlike service. The District Court, Middle District of Florida, made Findings of Fact and Conclusions of Law and entered judgment in favor of the Government against the plaintiff dismissing the action, and in favor of the Government against Jacksonville for attorney's fees expended in the defense of this claim.

As far as this appeal is concerned, we need not determine whether or not Jacksonville has standing to join in this appeal under Rule 14(c), F. R. C. P., as its assertion is that we affirm the entire judgment below, which position is consonant with that of the Government. Neither its brief nor its oral argument have raised any new issues or defenses. They only repeat additional factual circumstances going to the question of whether, assuming a duty of care owed by the Government to the plaintiff, there was a breach of that duty. This is an alternative argument which we need not reach to decide this case. Thus, Jacksonville's presentations are of no consequence.

The Government entered into a "Master Lump Sum Repair Contract"[1] with Jacksonville for the repair and

1. The pertinent part of which reads:

ARTICLE 4. *Workmanship and Inspection:*

(a) Unless otherwise specifically provided in the job order all workmanship, equipment, materials and articles, and all operational practices of the Contractor used in the performance of the work, shall be the best commercial marine practice and

reactivation of the Government vessel, the SS CAPE SAN MARTIN, which had been in the "moth-ball fleet" in the Hudson River. The vessel had been towed to Jacksonville's yards after the latter had been successful in its bid for the contract. In accordance with paragraph (c) of Article 4 of the contract, one Springs, a marine inspector, was placed on board the vessel, and he remained aboard during the entire period of repair. Aside from the rights and duties provided him in the contract (note 1), Springs' duties were approval and rejection of materials furnished under the terms of the contract; determination of need for change orders; certification of satisfactory completion of work and generally ensuring that Jacksonville complied with the contract at a minimum cost to the Government. The vessel was completely drydocked at the time of the accident and did not have motive power of its own. The Government retained title, but Jacksonville had complete custody.[2]

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shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies in accordance with the rules of said regulatory bodies.

(e) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the [Director, National Shipping] Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractors at its own cost and expenses.

(f) At the request of the authorized representative of the [Director, National Shipping] Authority the Contractor shall place reasonable safeguards, and shall put and keep at all time sufficient lights to prevent accidents, in spaces and areas in which the Contractor will be required to perform or has started work and to provide safe access and egress to and from the vessel.

2. The Contract provided:

ARTICLE 5. *Drydocking and Berthing*

(a) On entering and leaving a yard, pier, drydock or marine railway, the Contractor shall have charge of and be re-

The plaintiff was an employee of Jacksonville and was assigned by his supervisor to remove the valves of an evaporator in the engine room under the ship's deck. Already working in that same area was a cleanup crew which was engaged in removing debris from the engine room. The debris was placed into a five-gallon paint bucket, then hoisted by means of a block and tackle to a landing some 15 to 18 feet above plaintiff. There was testimony from the plaintiff and from workers on the clean-up crew that such use of paint buckets was "the usual way", and that it was safe as long as the bucket was not overloaded. On this occasion, the bucket was not overloaded (it was "only half filled", weighing ten to twenty pounds, whereas when filled with paint, it weighs fifty pounds). It had been hoisted about fifteen feet when the handle pulled out from one side and the bucket fell on plaintiff's head causing injury.

Plaintiff's sole contention is that the Government owed a duty to plaintiff to exercise due care to provide a reasonably safe place to work. Plaintiff does not contend that this duty is based on the Good Samaritan rule (i.e., that by its affirmative acts, the Government undertook to provide safety measures for the protection of Jacksonville's employees, which undertaking was relied upon by Jacksonville, and which was negligently carried out resulting in injury: *Roberson v. United States*, 9 Cir., 1967, 382 F. 2d 714). Nor does the plaintiff rely on the warranty of seaworthiness, recognizing that there is no such warranty where the vessel is withdrawn from navigation, is in dry dock for repair, is without a crew and motive power, and is unequipped for sailing. *West v. United States*, 361 U. S. 118 (1959); *Moye v. New Orleans Barge Lines, Inc.*, 5 Cir.,

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sponsible for the vessel within the limitations of this contract from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off.

1968, 402 F. 2d 238, cert. den. 395 U. S. 913 (1969), reh. den. 395 U. S. 987 (1969).

Instead, the plaintiff argues that the duty is derived from the combination of two factors: (1) the Government's ownership of the vessel and (2) the obligations created under the provisions in the contract (see note 1). The District Court rejected this contention, citing *Roberson*, supra, for the proposition that "the rights of an employee of an independent contractor with respect to the United States are not expanded by rights of inspection afforded to the United States by provisions in the contract between the United States and the injured party's 'employer'". The plaintiff contends that *Roberson* is not applicable to the case at bar and that the misapplication by the District Court was reversible error.

The plaintiff is correct in his assertion that the *Roberson* decision does not squarely answer the questions presented in the case at bar. The *Roberson* case held that the Government would not be subject to the Good Samaritan rule under the particular facts in that case. The Good Samaritan rule is a grounds for imposing a duty on the Government distinct from the grounds upon which the plaintiff here relies. However, there are many other cases, some cited in *Roberson*, which do not rely on the Good Samaritan rule, and which hold that the Government's retention of the right to inspect the work under construction to see that the provisions of the contract are carried out is not sufficient, in itself, to impose a duty on the Government, the breach of which will give rise to liability to injured employees of the contractor. *United States v. Page*, 10 Cir., 1965, 350 F. 2d 28; *Kirk v. United States*, 9 Cir., 1959, 270 F. 2d 110; *Filipek v. Moore-McCormack, Inc.*, 2 Cir., 1958, 258 F. 2d 734; *Gallagher v. United States*, 2 Cir., 1953, 206 F. 2d 177. See also *Hodge v. United States*, M. D. Ga., 1969, —

F. Supp. — [No. 2238, Feb. 1969], aff'd — F. 2d —. The District Court's statement merely reiterates this established rule, which is repeated in a different context in *Roberson*. It was not reversible error.

The real question posed by the plaintiff is under what circumstances will the Government be found to have a duty toward employees of independent contractors working under government contracts. Plaintiff contends that the circumstances here give rise to the imposition of such a duty. We do not agree. In reaching this conclusion, the following relevant factors are considered, seriatim: what law is applicable; the relationship between the parties; the terms of the contract; the acts of the parties regardless of the contract; who had control of the vessel, the work area, and the safety program; the nature of the risk involved; and when was the risk created.

While this action is brought under the Suits in Admiralty Act, supra, and the Public Vessels Act, supra, and their concomitant admiralty law, in this case we find no duty imposed thereunder any different from the duty imposed on other owners of property. Since the plaintiff is not invoking the seaworthiness warranty, the fact that the property owned by the Government here is a sea-going vessel does not differentiate this case from similar cases arising under the Federal Tort Claims Act, 28 U. S. C. 1346(b). See e.g., *Kirk*, supra, (federal dam project); *Market Ins. Co. v. Killon*, 5 Cir., 1969, — F. 2d — [No. 26,410, Sept. 8, 1969] (federal lake project); *Hodge*, supra, (airplane hangar on U. S. Air Force base).

Nor does the relationship between the parties here (contractee-contractor) give rise to the imposition of a duty on the Government. It is well settled "that a contractee is generally not liable for the torts of an independent contractor or of the latter's servants". *Roberson*, supra; *Kirk*,

supra; 41 Am. Jur. 2d, *Independent Contractors*, § 24 (1968).[3]

Nor do we find that the terms of the contract impose a duty on the Government. Paragraph (f) (note 1) specifically states that the *Contractor* was to place reasonable safeguards and provide adequate lighting to protect its employees. It is unreasonable to believe that the contractor was relying on the government inspector to suggest alternative methods of raising debris from the engine room. This plainly was not part of his duties, either under the terms of the contract or by tacit understanding. The inspector's duties in this case were broader, and more in the order of an overseer of acquisitions, costs and compliance with specifications. Placing upon the Government the responsibilities of carelessness on the part of the employees of its contractors in their day to day work procedures would certainly be good news to government contractors, but it would also be a gross misinterpretation of the intention of the contracting parties.

Perhaps the decisive factor involved here is who had control of the vessel, the work area, and the safety precautions. In *West*, supra, the Supreme Court stressed the importance of this factor when it said:

> . . . it would be manifestly unfair to apply the requirement of a safe place to work to the ship-owner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe (361 U. S. at 123).

The *West* case, which plaintiff strongly argues does not lend support to the Government's case, dealt with an injury

3. An exception to this general rule arises, of course, when the contractor has knowledge of a dangerous condition created by the independent contractor. *Emelcon, Inc. v. United States*, 5 Cir., 1968, 391 F. 2d 9. However, there is no evidence here that the government inspector had knowledge of any dangerous defect.

to the employee of an independent contractor working on a dry-docked vessel. The injury there was caused by a plug flying off the end of a pipe near which the plaintiff was working, when a fellow worker turned on the water pressure. The plaintiff cites the cases of *Stark v. United States*, 5 Cir., 1969, 413 F. 2d 253, and *Van Horn v. Gulf Atlantic Towing Corp.*, 4 Cir., 1968, 388 F. 2d 636, for the rule that *West* is limited to "instances in which the repair work created the unsafe condition." He would have us distinguish the injury in *West* from the present one on the grounds that it emanated from the very object which was to be repaired, whereas here the injury emanated from a work operation in the vicinity where plaintiff was working. We cannot say that cleaning out pipes is more or less hazardous than working in a room where a clean-up crew is removing debris. Both involve a certain amount of risk. Whether the actual injury is caused by the object being repaired or by other work being done in the vicinity is not cause for distinction where the risk is equally present in both situations. In both, the repair work creates the unsafe condition.

Thus, where the Government is not in control of the incident which created the risk (as in *West* and as in the case at bar), and where the risk is not a latent one created prior to the Government's loss of control (*Van Horn*, supra; *White v. United States*, 4 Cir., 1968, 400 F. 2d 74) nor an inherently dangerous one wherein the shipowner requires the work to be done in a manner inherently dangerous to human safety (*Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 2 Cir., 1962, 302 F. 2d 840) then it would be "manifestly unfair" to impose on the Government a duty to provide safety measures for employees of the contractor.

The record indicates that the Government had relinquished control of the vessel. The Government was not in

control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same. In fact, there is here much less possibility of control by the Government than in *West*, supra, where the Government had placed six inspectors aboard the dry-docked vessel.

Therefore, we find that this case is controlled by *West*, supra, and *Moye*, supra, and we affirm.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28615

D. C. DOCKET NO. CA68-1-J

LEO F. BAUM,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee,

v.

JACKSONVILLE SHIPYARDS, INC.,
Third-Party Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Before GODBOLD, DYER and MORGAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendant-third-party plaintiff-appellee and third-party defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 2, 1970

Issued as Mandate: Jun 24, 1970

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 5 1970
E. ROBERT SEAVER, CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1970

NO. 608

LEO F. BAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

v.

JACKSONVILLE SHIPYARD, INC.,

Respondent.

RESPONDENT JACKSONVILLE SHIPYARD, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner, hereafter, will be "Baum", or the plaintiff--as in the trail court. The Respondent United States of America will be designated as "the Government"; and the Respondent Jacksonville Shipyard, Inc. will appear herein as "the shipyard."

References to the main printed Appendix will be made in parentheses as follows: (A.); and references to the Supplemental Appendices filed herein will be made as follows: (S.A. [1]), indicating the supplemental appendix containing the ship repair contract, and (S.A. [2]), indicating the appendix containing more of the transcript of the testimony.

QUESTIONS PRESENTED

Respondent Jacksonville Shipyard, Inc. is not satisfied with either Petitioner's statement of the questions presented for review, or with the argumentative and factually unsupported manner in which said questions are framed, and would, instead, prefer to state the questions presented as follows:

The only real question presented for review herein is whether or not, under the facts and circumstances of this case, the United States owed a duty to the Petitioner, a shipyard worker, working aboard its vessel which was in drydock undergoing extensive repairs, to provide him with a safe place to work.

In order to answer this question, we feel that the following subsidiary questions must first be determined:

1. Did the United States, through the presence on board the vessel of its marine surveyor, and the provisions contained in the ship repair contract, retain sufficient "control of the ship" and the details of the shipyard's work, including the incident which allegedly created the risk to the Petitioner, so as to impose upon it a duty to see to it that the shipyard's employee, Leo F. Baum, was provided with a safe place to work?

2. Was the allegedly unsafe condition of which Petitioner

complains a "latent" one, created prior to the United States' relinquishment of control of the vessel?

3. Did the "work of repair" create the allegedly unsafe condition of which Petitioner complains?

4. Assuming arguendo that the United States had "control of the ship" and the details of the shipyard's work at the time of Petitioner's injury, did the United States have actual or constructive knowledge either that (a) the use per se of discarded five gallon paint buckets to haul debris from the interior of the vessel was inherently dangerous to human safety, or (b) that the Petitioner was working directly below where said buckets were being used, so as to perhaps cast upon the United States a duty to take reasonable precautions to prevent injury to the Petitioner, i.e., stop said practice?

* * * * *

No reference will be made herein to Petitioner's Question 1, as we concede that the Public Vessels Act, 46 U.S.C. §781, and the federal maritime law govern the liability of and duties owed by the Government to the Petitioner herein, if any, although we do feel that resort can and must, in some circumstances, be had to cases arising under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2674, insofar as the principles of the law of agency and independent contractors and interpretion of contracts is concerned, as that law does not, we submit, run afoul of the federal maritime law, and the principles laid down by this Court in *Kemerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L. Ed. 2d 550, 70 S.Ct. 406 (1959).

Nor will any reference be made herein to Petitioner's Question 4, as we submit with deference that there is no constitutional question involved in this case, and respectfully suggest that the alleged violation of Petitioner's rights under the Fifth

Amendment is merely an imaginative, though unfounded, argument advanced by his able counsel.

SUMMARY OF ARGUMENT

The Government owed no duty to the plaintiff herein to provide him with a safe place to work because, inter alia, the Government surrendered custody and control of the vessel to the shipyard for extensive repairs and reactivation, it did not, either through the presence on board of its marine surveyor or the provisions of the repair contract, retain "control of the vessel" or the details of the contractors' work, the "work of repair" created the alleged danger which resulted in the plaintiff's injuries, the danger did not arise from an inherent or "latent" defect present on the vessel prior to the Government's surrender of control thereof, and; consequently, this case is governed by the principles of law laid down by this Court in *West v. United States;* 361 U.S. 118, 4 L.Ed. 2d 161, 80 S. Ct. 189 (1959).

STATEMENT OF THE CASE

The plaintiff brought suit against the Government in the United States District Court for the Middle District of Florida under the Suits in Admiralty Act, 46 U.S.C. §§741, et seq., and the Public Vessels Act, 46 U.S.C. §§781, et seq., for injuries received while working as a machinist employed by Respondent Jacksonville Shipyard, Inc., on board the dry-docked vessel, the S.S. Cape San Martin, which was owned by the Government, and which was undergoing a reactivation overhaul in Jacksonville, Florida, pursuant to a contract between the Government and Jacksonville Shipyard, Inc.

The Government, in turn, brought a third-party action

against the shipyard on the theory that the liability of the Government, if any, was occasioned by the shipyard's breach of its implied warranty of workmanlike performance.

The evidence introduced at the trial below revealed the following:

The Government entered into a "Master Lump Sum Repair Contract" (S.A.[1], 8-66) with the shipyard for the repair and reactivation of the Government's vessel, the S.S. Cape San Martin, which had been in the "moth ball fleet" in the Hudson River. In accordance with Article 4(c) of the contract (S.A. [1] 19) the Government placed its marine surveyor, Jackson Springs, on board the vessel, and he remained aboard, periodically, during the entire period of repair (A. 74-82, 107).

Despite the presence on board the vessel of the Government's surveyor, however, the Government retained no "control of the ship" or the details of the shipyard's work.

The contract itself expressly provided, in Article 5(a), that "On entering and leaving a yard, pier, drydock or marine railway, the Contractor (the shipyard) shall have charge of and be responsible for the vessel within the limitations of this contract from the time the Contractor's lines are secured to the vessel until such time as all the Contractor's lines are cast off" (S.A. [1] 22).

The contract did, indeed, give Springs certain rights and impose upon him certain duties (Contract Articles 4(a), (c), (f) and (k), 9 (a) and 26 (a) (2). (S.A. [1] 18-22, 26 and 40 respectively; but a mere reading of the pertinent provisions of the contract, together with Springs' testimony, makes it abundantly clear that any powers given to Springs under the contract were designed simply to enable Springs to see to it

that the shipyard fulfilled its obligations, insofar as the contents of the contract were concerned, to reactivate the vessel at a minimum cost to the Government. These powers did not give Springs any control of the vessel or the details of the shipyard's work.

Springs' testimony reveals that he merely went on board the ship periodically to check the progress of the work (A. 70-71, 76). Although he testified that he considered it his duty as marine surveyor to supervise the contractor to see to it that all the workmanship, equipment, materials, articles and all operational practices were "the best commercial marine practices," and that if the contractor departed from any of those items he considered it his duty to complain to the management of the yard (A. 102-103), he had no control over the yard's *procedure of work* (A. 119). Only if the work jeopardized the ship or an individual would he comment about it to someone connected with the shipyard (A. 119). All he did was verify the *quality* of the work and the completion of the work (A. 111); and at no time did he ever give any orders or instructions to the shipyard's personnel (A. 112). His sole function, then, was one of inspection and supervision, to insure that the plans and specifications of the contract were complied with by the shipyard. This, to him, meant inspection of the various parts of the vessel to obtain the best possible reactivation, and to get it with the minimum cost to the Government, over and above the original agreed bid contract (A. 113-114).

On the day in question, the plaintiff was assigned by his leaderman, William R. Matthews, to work on a valve in the lower engine room (S.A. [2] 29-30). When he reported to the area, however, he discovered that another craft, the labor gang, was already working directly above where he would have to work, hauling rust scale and other debris from the

bilge by means of empty five gallon paint buckets and a block and tackle (A. 160-161, 170-179, 186; S.A. [2] 97).

Confronted with this obvious conflict in work assignments, the plaintiff was *not*, as he claims in his Petition (p. 6) *required* to work in this area! Mr. Matthews testified that generally, when two crafts are assigned to work in the same area on a ship, and their work will conflict, the craft with the highest priority remains and the other craft works elsewhere; and the job which plaintiff was assigned to do had no particular priority (S.A. [2] 30). Furthermore, if one of his men reported to a work area and found another craft working there, he was under instructions to report back to Mr. Matthews for reassignment to another task (S.A. [2] 31).

The plaintiff never reported back to Mr. Matthews that day about the conflict between his assigned task and the task of the labor gang (S.A. [2] 31), but instead, went ahead and started to work directly below the laborers. Although the plaintiff maintained otherwise, two of the laborers who were working in that same area when the plaintiff arrived, Robert Edwards and David Goosby, both testified that they warned the plaintiff repeatedly to move out of the area, but he refused to do so (A. 187; S.A. [2] 16, 17, 97).

It was while the plaintiff was working below the laborers that the bail, or handle, on one of the buckets pulled loose and the bucket fell, strking plaintiff on the the head. The removal of debris by the labor gang was clearly part of the repair work and reactivation of the vessel called for by the ship repair contract (Article 3(e), S.A. [1] 17); and it was this very repair work which created the condition alleged by the plaintiff to have been unsafe.

There was, however, nothing inherently dangerous about the manner in which the labor gang was removing debris

from the bilge of the vessel. The five gallon paint buckets themselves were not "flimsy," as maintained by the plaintiff in his Petition (p. 6). The bucket handles were designed to hold a full bucket of paint, weighing in the neighborhood of fifty to eighty pounds, and the laborer who was loading the buckets at the time of plaintiff's injury testified that he would never load the buckets more than twenty pounds (S.A. [2] 13).

Furthermore, all of the witnesses testifying on the point stated that for as long as any of them could recall, empty five gallon paint buckets had customarily been used for the purpose of removing debris from the interior of vessels--that it was "the usual way" (A. 179, 180; S.A. [2] 4, 14, 32, 99, 102). Commander John F. Fitzgerald, the Safety Director for Jacksonville Shipyard since 1964 (A-359), testified that it was customary and general within the ship repair business to use discarded paint buckets to haul debris out from ships--indeed, it was "very customary--universal" (A-151). He had been a Coast Guard Inspector in shipyards for seventeen years prior to retiring, and "these buckets have been used continually by the labor gangs, in cleaning out tanks, for their smallness" (A. 151). Indeed, this type of bucket is the only practical way of removing debris through small openings (S.A. [2] 74).

Plaintiff claims that the Government surveyor *knew* that in this trade hoisting containers were "generally" used for this ship-board work which were constructed with heavier handles and were more securely fastened to the bucket (Petition, p.7). This is not true! Springs testified that aluminum buckets are sometimes used on tankers, but the reason for the use of this type of bucket rather than a steel bucket is "to prevent the possibility of spark of explosion, something that might cause an explosion" (A. 92, 113).

Buckets had been seen to fall on rare occasions, but *only* when they were overloaded (A. 188; S.A. [2] 9, 14, 15); and the uncontradicted testimony revealed that the buckets were *not* being overloaded on the day in question (S.A. [2] 15). Nor had anyone ever been hurt by a falling bucket before, according to the testimony (A-188; S.A. [2] 18, 32). On the contrary, the evidence showed that the use of these buckets was perfectly safe if everyone working around them merely took normal precautions for their own safety (A. 209; S.A. [2] 20), i.e., stepping back out of the way as they go up (S.A. [2] 18).

Plaintiff also claims that because the buckets would fall on occasion, shipyard workers had been complaining to their supervisors about the use of these buckets for a period of three years before plaintiff's accident; and that "Springs necessarily knew then of this danger" (Petition, p. 7). This, too, is untrue. Neither the laborer, Edwards (S.A. [2] 12, 14), nor the laborer, Goosby (S.A. [2] 99), nor the plaintiff's leaderman, Matthews (S.A. [2] 32, 45, 49), nor the shipyard's safety director, Commander Fitzgerald (S.A. [2] 74-75), nor the maritime safety officer and district supervisor for the Bureau of Labor Standards in Jacksonville, Florida, Mr. Gardner (S.A. [2] 56), nor, indeed, Springs himself (A. 105, 106, 110-111) had *ever* heard any complaints whatsoever regarding the use of the buckets in the manner which plaintiff contends to have been unsafe!

The above-mentioned Mr. Gardner *did* receive a letter (A. 54-55) from the vice president of a union which, at the time, was attempting to organize Jacksonville Shipyard, though unsuccessfully, in which it was stated that "we have received scores of complaints from Jacksonville Shipyard, Inc., employees" regarding the use of "paint cans and buckets to raise and lower buck . . ." Although this letter was dated January

9, 1967, (one day prior to plaintiff's accident), it was never even mailed until *after* plaintiff's accident. Furthermore, the writer of the letter had never been on the premises of the shipyard (A. 269), and he was unable to support these alleged complaints with any documentary evidence, such as the names of the workers who might have made the complaints referred to in his letter (A. 270-271).

Nevertheless, in response to this letter, Mr. Gardner directed a maritime inspector to make a special inspection of the yard; yet the inspection failed to uncover any situation in violation of the safety and health regulations for ship repairing (A. 252), and no violation notice needed to be served on the yard (S.A. [2] 51-53, 58).

In the face of the testimony averred to above, however, plaintiff has continued to insist throughout these proceedings that the Government surveyor, Springs, *knew* that the use of the paint buckets in the manner in which they were being used constituted a dangerous condition, per se. There is no evidence to support this contention!

Springs was fully aware that the shipyard employees were, prior to January 10, 1967, using empty five gallon paint buckets to haul debris from the vessel, but he had never made any complaints to the shipyard concerning that practice (A. 103). In fact he never saw the shipyard at any time engaged in any practices which he thought were unsafe or dangerous (A. 117, 118). That is, of course, because the use per se of the empty paint buckets was *not* dangerous.

If an unsafe condition *ever* existed with regard to the use of the buckets, it only came into existence when the plaintiff stubbornly insisted on working directly below where the labor gang was working, despite his knowledge that it was dangerous to work there (A. 162, 163), despite instructions from his

foreman not to work in an area where his work would conflict with another craft's work (S.A. [2] 31), and despite numerous warnings by the laborers not to work in that area (A. 187-189; S.A. [2] 97). If this be the dangerous condition of which plaintiff complains, it is clear that the "work of repair" created it.

And there is absolutely no evidence anywhere in the record that the Government, through its agent, Springs, ever knew or *should* have known, that the plaintiff himself had created this allegedly dangerous situation!

The District Court, Middle District of Florida, made Findings of Fact and Conclusions of Law (A. 395-401), and entered judgment in favor of the Government against the plaintiff dismissing the action, and in favor of the Government against Jacksonville Shipyard, Inc. for attorneys' fees expended in the defense of the claim (A. 418).

The United States Court of Appeals for the Fifth Circuit affirmed, holding:

> "Thus, where the Government is not in control of the incident which created the risk (as in *West* [West v. U. S., 361 U.S. 118, 4 L.Ed. 2d 161, 80 S.Ct. 189 (1959)] and as in the case at bar), and where the risk is not a latent one created prior to the Government's loss of control (*Van Horn*, supra [Van Horn v. Gulf Atlantic Towing Corp., 388 F. 2d 636 (4th Cir. 1968)]; White v. United States, 4 Cir., 1968, 400 F. 2d 74) nor an inherently dangerous one wherein the shipowner requires the work to be done in a manner inherenly dangerous to human safety *Halecki v. United New York and New Jersey Sandy Hook Pilots Assn.*, 2 Cir., 1962, 302 F. 2d 840) then it would be 'manifestly unfair' to impose on the Government a duty to pro-

vide safety measures for employees of the contractor.

"The record indicates that the Government had relinquished control of the vessel. The Government was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same. In fact, there is here much less possibility of control by the Government than in *West*, supra, where the Government had placed six inspectors aboard the dry-docked vessel.

"Therefore, we find that this case is controlled by *West*, supra, and *Moye*, supra [*Moye v. Sioux City and New Orleans Barge Lines, Inc.*, 402 F. 2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913], and we affirm."

Plaintiff has petitioned this Honorable Court for a Writ of Certiorari. With the greatest deference, however, we respectfully submit that the decisions of the District Court and the Court of Appeals were correct, and that there has been no showing by Petitioner that his Petition should be granted.

ARGUMENT

Basically, the only question presented for review herein is whether, under the facts and circumstances of this case, the Government owed a duty to the plaintiff to provide him with a safe place to work. The question is, we submit, controlled both from a factual standpoint, as well as a legal standpoint, by this Court's opinion in *West v. United States*, 361 U.S. 118, 4 L. Ed 2d 161, 80 S. Ct. 189 (1959).

There, as here, the plaintiff was an employee of an independent contractor, and while working inside the main engine

of a government vessel as it was undergoing a complete overhaul at the contractor's repair dock, he suffered injuries when an end plug from a pipe in the water system was propelled through the top of the open cylinder and hit his knee. The repair contract listed the defective water line and plug in the specifications for "cleaning and repair" and the replacement of defective or missing plugs.

The contractor there, as here, was to have complete responsibility and control of the making of repairs, with the right in the United States to inspect the work and materials to insure compliance with the contract. For this purpose, the United States placed six of its men on board the vessel. However, they signed no shipping articles and had no "control of the ship in the ordinarily accepted context," their sole function being to serve as inspectors for the United States.

The plaintiff sought recovery on the theory that the vessel was unseaworthy; and in addition (as in our case), he claimed that the United States was liable for negligence in not maintaining a safe place for him to work, a duty asserted to be non-delegable and absolute.

This Court held that as the ship had been removed from active maritime service, and was undergoing repairs to make it seaworthy, under the circumstances the doctrine of seaworthiness had no application. More important to our case, however, this Court also held that the Government, as the shipowner, did not owe the plaintiff a duty to furnish a safe place to work, nor was it otherwise negligent in failing to keep the water plug tight.

Quoting from that opinion (4 L. Ed. 2d 161, 165, 166):

> "Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty

to exercise reasonable care to furnish a safe place to work. But we do not believe that such a duty was owed under the circumstances of this case. *Petitioner overlooks that here the respondent had no control over the vessel, or power either to supervise or to control the repair work in which petitioner was engaged.* We believe this to be decisive against both aspects of plaintiff's dual theory. There was no hidden defect in the water system. It was one of the objects to be repaired and its plugs were to be replaced where necessary. Its testing was to be done by the contractor--not by the shipowner. *It appears manifestly unfair to apply the requirements of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe.* The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel--including the testing--was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. [Citing *Filipek v. Moore-McCormack Lines, Inc.*, 258 F2d 734 (2nd Cir. 1958)]. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers."

The facts of our case so closely parallel the facts involved in *West* as to be nearly identical thereto.

Baum, too, was the employee of an independent ship repair contractor, engaged to repair and reactivate a Government-owned vessel.

The shipyard here, as in *West*, was to have complete re-

sponsibility and control of the making of repairs (Ship Repair Contract, Article 5(a), S.A. [1] 22).

Under the repair contract here, the Government was also given the right to inspect the work and materials to insure compliance with the contract; and for that purpose, the Government placed only one (not six, as in *West*) of its men on board the vessel, to check the progress of the work, and to verify the quality and completion thereof.

The Government's surveyor here, too, did not sign any shipping articles and had no "control of the ship in the ordinarily accepted context," or the details of the shipyard's work, his sole function being to serve as an inspector for the Government. The Government's surveyor did not participate in the work in any manner, nor did he give any instruction or orders to the shipyard employees. In fact, Baum, as did the plaintiff in *West*, took his orders from his foreman, Mr. Matthews. As did the plaintiff in *West*, "he knew who was in control" of the vessel (*West*, supra, 4 L. Ed. 2d 161, 165).

Here, as in *West*, the "work of repair" created the allegedly unsafe condition. If the use by the labor gang of empty five gallon paint buckets to haul debris from the interior of the vessel was dangerous, per se, which we do not for a moment concede, this was certainly part of the repair work necessary to reactivate the vessel in compliance with the terms of the contract. If, however, it was only when the plaintiff insisted on working directly below where the laborers were using the buckets that an unsafe condition was created, which we feel to be the case, then it cannot be said that the "work of repair" did *not* create the danger which made that area unsafe. The work on the valves in the engine room, Baum's responsibility, was repair work every bit as much as was the clean-up work being done by the labor gang; and when Baum chose

to perform his repair work in direct conflict with the laborers' repair work, the unsafe condition was created--a condition of which the Government surveyor could not, and did not, have any knowledge, and over which he had no control.

The allegedly unsafe condition of which plaintiff here complains was not a 'latent' one, but one which was created, if at all, by the plaintiff himself when he insisted on working beneath the buckets. There was no "hidden defect" in either the laborers' use of the buckets, or the valves which Baum was to repair. Baum *knew* full well that he was not supposed to work beneath the buckets, and, in fact, that it could well be dangerous to do so. The risk assumed by Baum, here, was one which he knew was inherent in working below the buckets, and the Government was under no duty to protect him from said risk, even had it had an opportunity to do so.

Hence, and with all due respect, we submit that this Court's decision in *West*, supra, is controlling here, and that under the facts of this case, the Government owed no duty to furnish the plaintiff with a safe place to work.

* * * * *

Turning now to the subsidiary questions we raised at the outset herein, we shall attempt to dispose of them as briefly as possible, in the order in which they were presented.

I

THE GOVERNMENT DID NOT RETAIN CONTROL OF THE VESSEL OR THE DETAILS OF THE CONTRACTOR'S WORK

Plaintiff contends that because the Government surveyor had authority to enforce the safety requirements of the contract (Petition: pp. 7-9, 13), the Government retained sufficient control of the vessel and the details of the shipyard's

work so as to impose upon it a duty to see to it that the shipyard employees were furnished with a safe place to work.

An examination of other pertinent provisions of the contract, however, reveals the following:

1. Upon entering the shipyard, complete custody and control of the vessel, within the limitations of the contract, was surrendered by the Government to the Contractor. [Article 5(*a*), S.A. [1] 22];

2. The Contractor was to furnish all labor, materials, supplies, equipment, facilities and *services* [Article 3(a), S.A. [1] 16], subject to the Government's right to approve and reject materials furnished under the terms of the contract [Article 4(a) S.A. [1] 18];

3. The Contractor's performance of the work was subject to inspection, testing and rejection by the Government [Article 4(c), S.A. [1] 19];

4. The Government could determine need for change orders [Article 6(a), S.A. [1] 22]; and

5. The Government would certify satisfactory completion of the work upon completion of the work by the Contractor in compliance with the terms of the contract [Article 3(e), S.A. [1] 17].

A reading of the entire contract, and the Government surveyor's testimony that he had no control over the shipyard's *procedure* of work, never gave any instruction or orders to the shipyard personnel, and indeed, that his sole function was one of inspection and supervision, coupled with the fact that the plaintiff himself took *his* orders from his leaderman, and not the Government surveyor, makes it abundantly clear that the powers given the Government surveyor under the contract were designed solely to enable him to see to it that the

shipyard completed the contract according to the terms and specifications thereof, at a minimum cost to the Government.

Consequently, the Government did not have the degree of control over the ship or the repairs required to impose upon it a duty to furnish plaintiff with a safe place to work. *West v. United States*, supra; *Moye v. Sioux City and New Orleans Barge Lines, Inc.*, 402 F. 2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913.

Two cases worthy of special comment here are *Gallagher v. U. S. Lines Co.*, 206 F. 2d 177 (2nd Cir. 1953), and *Filipek v. Moore-McCormack Lines*, 258 F. 2d 734 (2nd Cir. 1958).

In *Gallagher*, the contract in question provided for the handling of the loading operations by the Contractor "in the order directed by and manner satisfactory to the Owner." It further provided that the Contractor "shall use such equipment approved by the Owner as is best adapted for the proper and safe handling of the cargo . . ."

Said the Court:

> ". . . a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirements of the contract does not of itself make the hirer of our independent contractor liable for harm resulting from negligence in conducting the details of the work . . . The hirer 'must have the power to control the manner of performing the very work in which the carelessness occurred' . . .
>
> "Consequently, in the case at bar United's liability turns on the interpretation of the contract between it and Hogan in respect to the control retained by the former over the stevedore's activities. We do not think that by giving United a general power to approve the

> equipment to be used the intent of the parties to this contract was to reserve to United the detailed control that would make it liable for the injury to the plaintiff's decedent. United never exercised any control over the details of the work, which is some indication of what the parties and the contract intended . . . Moreover, when the clause in question is read in conjunction with the rest of the contract it is clear that the power of approval over the equipment was only reserved to insure that Hogan complied with its contract to do the stevedoring work on United's vessels, rather than to regulate the details of the work."

And, quoting from the *Filipek* opinion:

> "It is likewise clear that the plaintiff's charge that the defendant was negligent in failing to see that work was done safely is without merit. While certain of the ships officers were present during the testing of the equipment, it is apparent that they were there not to direct the work or participate in it in any way, but merely as observers. The work of Filipek and the other Eastern employees was actually supervised by Eastern's foreman (as in our case). No orders were in fact given by any of the ship's officers (nor by the Government surveyor here). The mere presence of some of the ship's officers placed no duty on Moore-McCormack to see that the work was being done in a safe manner by Eastern's employees (citing *Gallagher*, supra).

Reference may also be had, we submit, to *U.S. v. Page*, 350 F. 2d 28 (10 Cir. 1965) and *Kirk v. U.S.*, 270 F. 2d 110 (9th Cir. 1959), which cases, though not federal maritime cases, nevertheless stand for the principle of the law of agency and independent contractors that the reservation in a contract of

the right to inspect the work and facilities of the independent contractor, including the contractor's adherance to contract safety provisions, and to stop the work if the provisions of the contract are not being carried out, is not sufficient to render the owner liable for the negligence of the contractor — especially in view of the fact that this very principle of law was adhered to in *West*, supra, *Gallagher*, supra, and *Filipek*, supra, all of which are federal maritime cases.

II

THE ALLEGED UNSAFE CONDITION WAS NOT A "LATENT" ONE, CREATED PRIOR TO THE GOVERNMENT'S RELINQUISHMENT OF CONTROL OF THE VESSEL

This Court, in *West*, supra, stated that "there might be instances of hidden or inherent defects, sometimes called 'latent', that would make the owner guilty of negligence, even though he had no control of the repairs. . ."

Apparently, this was the basis of the finding of liability in *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (4th Cir. 1968), and *White v. U.S.*, 400 F. 2d 74 (4th Cir. 1968), both of which cases were cited by plaintiff at pages 17 and 19 of his Petition; for in each of those cases the shipowner had control of the vessel at the crucial time--the creation of the dangerous condition.

In our case, however, it is manifest that the dangerous condition, if one did in fact exist, was only created after the Government relinquished control of the vessel to the shipyard.

III

THE "WORK OF REPAIR" CREATED THE ALLEGED UNSAFE CONDITION

Plaintiff contends, at page 19 of his Petition, that "the repair work contracted for did not create the unsafe condition – the long-continued known dangerous practice of hoisting debris in discarded paint cans did," and that consequently this Court's opinion in *West* is not applicable here. Instead, plaintiff reads *West* as limited to situations where the injury is caused by the very defect the shipyard is hired to repair (Petition, p. 18).

We do not agree that *West* is so limited. Although the plaintiff, in *West*, *was* injured by one of the very items the shipyard had been hired to repair, the language used by this Court in that opinion does not seem to contain any such limitation as contended for by the plaintiff herein. Referring again to that language:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repair, and *the work of of repair in effect creates the danger which makes the place unsafe* . . . The respondent . . . was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract."

Van Horn, supra, does not, as contended by plaintiff, state that West contains the limitation he insists it does, but instead, distinguishes *West* as a situation where the shipower had no control of the vessel when the dangerous condition was created.

And *White v. United States*, supra, merely states that "We read West . . : as limited to instances in which the work of repair created the unsafe condition."

Here, as in *West*, the plaintiff was injured by the "work of repair." The shipyard had been hired to repair and overhaul the valves in the engineroom, among other things, and this was what plaintiff was doing when he was injured. Furthermore, the Contract provides [in Article 3(e), S.A. [1] 17] that "completion of the work covered by the job order) shall include the removal from the vessel of . . . all scrap and rubbish resulting from the work;" and this is precisely what the labor gang was doing, in a manner which had long been customary and general within the industry--and this is precisely what caused plaintiff's injuries.

The opinion of the Fifth Circuit Court of Appeals herein is not, as plaintiff contends, in conflict with its earlier opinion in *Stark v. United States*, 413 F. 2d 253, 254 (5th Cir. 1969). In *Stark*, the Court stated that "We read *West* . . . as limited to instances in which the repair work created the unsafe condition." It went on, however, to distinguish that case from *West* on the basis that there, the dangerous condition or latent defect existed *prior* to the turning over of the ship to the contractor.

The Court below held that "whether the actual injury is caused by the object being repaired or by other work being done in the vicinity is not cause for distinction where the risk is equally presently in both situations. In both the repair work creates the unsafe condition."

With deference we submit that the Court below was correct in so holding, and that *West* is not as limited as the plaintiff insists it is.

IV

THE GOVERNMENT, THROUGH ITS MARINE SURVEYOR, HAD NO KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF ANY DANGEROUS CONDITION ON THE VESSEL

Plaintiff argues that "a shipowner possessing knowledge of its contractor's dangerous methods and practices, and having sufficient opportunity and power to prevent their use, should be held liable to the contractor's employees who may be injured by such practices if the shipowner fails to exercise its right and powers to eliminate the danger." (Petition, p. 22).

He also contends that the decision of the Court below, that "there is no evidence here that the Government inspector had knowledge of any dangerous defect," conflicts with this Court's holdings in *Albanese v. N. V. Nederl. Amerik Stoomv. Mats.*, 382 U.S. 283, 15 L. Ed. 2d 327, 86 S. C. 429 (1965) and *United New York & N. V. S. H. Pilots Asso. v. Halecki*, 358 U.S. 613, 3 L. Ed. 2d 541, 79 S. Ct. 517 (1959).

As we read the cases, however, a shipowner's actual or constructive knowledge of a dangerous condition created by the contractor will not impose a duty on the shipowner to see to it that such condition is corrected *if* (1) the shipowner has no control over the vessel or the repair work, (2) the work of repair in effect creates the dangerous condition, and (3) the dangerous condition does not arise from a hidden, inherent or "latent" defeat created prior to the shipowner's relinquishment of the control of the vessel. *West*, supra.

With regard to *Halecki*, supra, this Court, in *West*, said:

> "Nor was United New York & N.J.S.H. Pilots Asso. v. Halecki . . . a similar situation. In that case the shipowner directed the use of carbon tetrachloride in the

> confined spaces of the engine room. The resulting fumes fatally injured the shore-based workman, necessitating a remand on the negligence question. *But here the owner had no control of the ship;* it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner."

Thus, *Halecki*, where the shipowner was charged with knowledge that carbon tetrachloride was dangerous to human life, was distinguished from the facts in *West* on the basis that in *Halecki* the shipowner had not relinquished control of the vessel, and had, in fact, directed that the carbon tetrachloride be used in the engine room.

In *Albanese*, supra, too, the shipowner had apparently retained control of the vessel, for this Court, in its opinion, made absolutely no reference to the control factor. It cited in its opinion the case of *Gutierrez v. Waterman S. S. Co.*, 373 U.S. 206, 10 L. Ed. 2d 2997, 83 S. Ct. 1185 (1963), wherein the ship was obviously still in the control of the shipowner, for there the ship was merely being unloaded when the injured longshoreman slipped and fell on some beans which had been spilled on the pier.

Certain it is that actual or constructive knowledge on the part of a shipowner of a dangerous condition created by an independent contractor *can* cast liability on the shipowner if it fails to take reasonable steps to correct the dangerous condition and the condition results in injury to an employee of the independent contractor; but *not* where the ship has been completely turned over to the contractor for extensive repairs, the shipowner has retained no control over the vessel or the work, the work itself creates the danger, and the danger is not the result of a hidden, latent defect in existence before the

shipowner turned the vessel over to the contractor. *West* supra.

The Second Circuit's later opinion in *Albanese v. N.V. Nederl. Amerik Stoomv. Matts*, 392 F. 2d 763 (2nd Cir. 1968), wherein it is stated that "regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to *keep* the area a safe one in which to work" is either in headlong conflict with *West*, and therefore erroneous, or merely refers to situations where the shipowner may not have control over the work but still retains control of the vessel on which the work is taking place.

The opinion of the Court below is not in conflict with *Aldridge v. States Marine Corp. of Delaware*, 265 F. 2d 554 (9th Cir. 1959) either, as in that case the vessel was in complete control of the owner and, in fact, the ship's officers, though specifically requested to, refused to provide the longshoremen with proper tools to perform their work.

At any rate, plaintiff's arguments regarding the Government's knowledge vel non of a dangerous condition are, we submit, unfounded in the first instance, because, hopefully, we have already shown that the use per se of empty five gallon paint buckets to haul debris from vessels is *not* inherently dangerous, and further, that the Government's surveyor could not possibly have known that the plaintiff would disobey his instructions, and stubbornly insist on working directly beneath where the buckets were being used, knowing all the while that to do so placed him in a position of potential danger.

CONCLUSION

Plaintiff insists that we apply the Public Vessels Act, 46 U.S.C. §781, and the federal maritime law, rather than the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, and the law of the place where the wrongful act or omission occurred, in determining whether or not the Government, under the facts of this case, owed a duty to the plaintiff to provide him with a safe place to work.

We have done so!

The federal maritime cases clearly demonstrate that, under the facts of *this* case, the Government did *not* owe the plaintiff any duty to provide him with a safe place to work.

Nor does the opinion of the Fifth Circuit Court of Appeals herein conflict with any of the cases cited in the plaintiff's petition. Instead, it is in complete accord with the federal maritime law which governs the facts of this case.

Therefore, we submit with the greatest deference that there has been no showing by Petitioner of a need for this Court to exercise its power of supervision, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO CERTIFY that copies hereof have been furnished the following counsel, by U. S. Mail, this 30 day of September 1970:

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SUPREME COURT U. S.

No. 608

In the Supreme Court of the United States

OCTOBER TERM, 1970

LEO F. BAUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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WILLIAM D. RUCKELSHAUS,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 608

LEO F. BAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8–A16) is reported at 427 F. 2d 215. The decision of the district court (Pet. App. A2–A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1970. The petition for a writ of certiorari was filed on August 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly concluded that the United States was not liable for petitioner's in-

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juries, caused by his fellow employees, while doing repair work on a government-owned vessel which had been turned over to petitioner's employer for reactivation from the "mothball fleet."

STATEMENT

Petitioner, an employee of Jacksonville Shipyards, brought this suit against the United States, as owner of the S.S. CAPE SAN MARTIN, seeking damages for personal injuries sustained on board that vessel while it was in drydock undergoing the repair and overhaul work necessary to reactivate it from the "mothball fleet." The repair work was done by Jacksonville pursuant to the general provisions of a "master lump sum repair contract," entered into in 1957, and specific job orders, relating to the CAPE SAN MARTIN, issued in 1966. Under the contract, Jacksonville had complete custody of and responsibility for the vessel (Art. 5; Resp. App., *infra*, p. 9). The government's only direct connection with the vessel was the presence on board of a marine surveyor, whose basic function under the contract was to inspect and test Jacksonville's work (Art. 4(c), Resp. App., *infra*, p. 11; App. 98, 104, 113–114),[1] and who testified that he had no contact with Jacksonville's workmen (App. 115) and did not supervise their work or the repair operation (App. 67, 111–112, 114–115, 119).

The contract required Jacksonville to "exercise reasonable care and use its best efforts to prevent

[1] "App." and "Supp. App." references are to the appendices filed in the court of appeals, copies of which we are lodging with the Clerk.

accidents, injury or damages to all employees * * *" (Art. 9(a), Resp. App., *infra*, p. 10); to use "the best commercial marine practice" with respect to "all workmanship, equipment, materials and articles, and all operational practices * * *" (Art. 4(a), Resp. App., *infra*, p. 9); and, at the request of the marine surveyor, to "place reasonable safeguards * * * to prevent accidents in spaces and areas in which" it was working (Art. 4(f), Resp. App., *infra*, p. 10). The contract gave the government the right to terminate the work covered by the job order for Jacksonville's failure to perform any of the provisions of the contract (Art. 26(a), Resp. App., *infra*, pp. 11–12).

Petitioner was employed by Jacksonville as a marine engineer. On the day he was injured, he had been assigned to remove two valves from a line under the ship's deck. When he arrived at his assigned place, he found other Jacksonville employees already there, cleaning the engine room of scale, rust and trash. They were using discarded five-gallon paint buckets to raise the debris out of the ship. This was a common practice (App. 82–83, 151, 180, 198; Supp. App. [2] 73–74) and was not dangerous unless the buckets, which weighed fifty pounds when filled with paint (Supp. App. [2] 15; see Pet. App. A11), were overloaded (App. 188; Supp. App. [2] 5, 9).

One of the men removing the debris asked petitioner to leave because of the conflict in work assignments (App. 187), but petitioner declined to do so. Shortly thereafter, the handle pulled out of a bucket which had been filled with a "rather light" load of

only ten to twenty pounds of debris (App. 192). The bucket fell ten or fifteen feet and struck the petitioner.

Petitioner sought recovery from the government on the theory that it had control over the operations of the contractor and was therefore under a duty, as vessel owner, to exercise reasonable care to provide the contractor's employees with a safe place to work; and that its inspector breached that duty by failing to order Jacksonville to discontinue using the paint buckets for hauling debris.

After a trial, the district court denied recovery to the petitioner. The court refused to make a proposed finding that the use of the paint buckets was an unsafe operational practice constituting a violation of the contract (Pet. App. A7; App. 406–407). It found that the petitioner's injuries had been caused solely by acts of his fellow employees and that no government employee had "participated in any way" in those acts (Pet. App. A3). The court further found that the government's inspector did not "supervise or participate in the work" which resulted in petitioner's injury (Pet. App. A5).

The court of appeals affirmed. Stressing testimony that the use of paint buckets was "the usual way" and was safe so long as the buckets were not overloaded (Pet. App. A11), the court held there was no evidence that the government inspector had knowledge of a dangerous defect (Pet. App. A14, n. 3). It held, in any event, that the government's retention of the right to inspect the work to insure compliance with the contract was not sufficient to impose on the government

the duty asserted by the petitioner (Pet. App. A12) and that it "plainly was not part of" the inspector's duties, "either under the terms of the contract or by tacit understanding," to "suggest alternative methods of raising debris from the engine room" (Pet. App. A14). It concluded that since "the Government had relinquished control of the vessel * * *, was not in control of the work area, the manner of detail performance, nor safety procedures, and it was not a duty of the single inspector on board to take control of same," this Court's decision in *West* v. *United States*, 361 U.S. 118, precluded relief to petitioner (Pet. App. A15–A16).

ARGUMENT

1. Both courts below correctly recognized that *West* v. *United States*, *supra*, required denial of the petitioner's claim. In *West*, the government had hired a contractor to overhaul and recondition a mothballed vessel. The contractor had complete responsibility for and control over the repairs, although the United States retained the right to inspect the work and materials to insure compliance with the contract. This Court stated it was manifestly unfair to place the duty of furnishing a safe place to work on a shipowner who had no control over the ship or the repairs when it was the work of repair that created the danger which made the ship unsafe. It therefore held that the government was under no duty to protect an employee of the contractor from risks that were inherent in carrying out the contract. 361 U.S. at 123. This was so despite the presence on board of six govern-

ment inspectors who, like the one inspector here, gave no orders and did not participate in the work or supervise its progress (*ibid.*).

Seeking to distinguish *West*, petitioner relies on the government's right to require Jacksonville to comply with the safety provisions of the contract as establishing sufficient "control" of the repair work to warrant imposing the duty on the government to exercise reasonable care to furnish a safe place to work. That reliance is misplaced. The contractual provisions involved in this case are substantially identical to those involved in *West* (see Resp. App., *infra*, pp. 9–12),[2] which this Court has already determined did not give the government the requisite "control over the vessel, or power either to supervise or to control the repair work." 361 U.S. at 119, 123. Consequently, the contractual provisions here provide no basis for distinguishing this case from *West* and raise no question warranting review by this Court.

2. The petitioner's factual assertion that the government inspector had knowledge of a dangerous condition, *i.e.*, the practice of using paint buckets to haul

[2] The provisions relied on by the petitioner are contained in the Master Lump Sum Repair Contract between Jacksonville's predecessor and the government (see p. 2, *supra*). That contract is in the 44-page standard form used by the National Shipping Authority (see 32A C.F.R. Chap. XVIII, SRM-5). In *West*, the contract involved (see Transcript of Record, No. 11, O.T., 1959, pp. 85, 121–122) was the standard form lump sum repair contract then utilized by the Maritime Administration. For the Court's convenience, we have set out in an Appendix hereto the provisions of the contract relied on by the petitioner here and the corresponding provisions of the *West* contract.

debris, was presented to and rejected by both courts below. Although the inspector may have been aware of that practice, the courts below accepted the testimony establishing that it was a customary one and not dangerous.[3] There is no occasion for further review of those factual findings. Since the petitioner has failed to establish the necessary factual predicate, there is no need to consider his contention that an inspector's knowledge of a dangerous condition would give rise to a duty in the government to correct that condition.[4]

3. Contrary to petitioner's assertion, there is no conflict between the decision below and the decisions of other courts of appeals. In *Van Horn* v. *Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (C.A. 4), the court merely held that where a dangerous condition was created prior to the time that a shipowner delivered his vessel to drydock for repair, the shipowner was under a duty to exercise reasonable care to provide a safe place to work with respect to that condition. In *White* v. *United States*, 400 F. 2d 74 (C.A. 4), the court held that recovery would lie if the shipowner

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[3] Petitioner's assertions that the paint cans had "flimsy" handles (Pet. 6) and that better constructed containers were "generally used" (Pet. 7) are not supported by the cited appendix references.

[4] In any event, petitioner's reliance (Pet. 15–16) on *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 382 U.S. 283, and *United Pilots Ass'n.* v. *Halecki*, 358 U.S. 613, as establishing the existence of such a duty, is misplaced. *Albanese* involved an injury occurring on a live ship which was in the control of its owner, while *Halecki*, as this Court explained in *West*, 361 U.S. at 124, involved a shipowner who was in control of the repair work to the extent that it had directed the use of a dangerous substance.

had assumed the duty to provide a firewatch but had failed to carry it out properly. Here, by contrast, the government assumed no duties and the alleged unsafe condition arose from the repair work after the government had relinquished control.[*]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] Nor is there conflict with *Stark* v. *United States*, 413 F. 2d 253 (C.A. 5), which fully recognizes that when the work of repair creates the dangerous condition, no obligation may be placed on the shipowner. *Aldridge* v. *States Marine Corp. of Delaware*, 265 F. 2d 554 (C.A. 9), certiorari denied, 361 U.S. 814, also relied on by petitioner, is inapposite. It involved a longshoreman who was injured while unloading a live vessel, allegedly as the result of the direct refusal of the vesselowner, who had retained control over the vessel, to provide the necessary and appropriate equipment to perform his work.

APPENDIX

Relevant Provisions of the Master Lump Sum Repair Contract governing the reactivation of the SS CAPE SAN MARTIN (*Baum* injury)

ARTICLE 5. *Drydocking and Berthing.*

(a) On entering and leaving a yard, pier, dry dock or marine railway, the Contractor shall have charge of and be responsible for the vessel within the limitations of this contract from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off.

* * * * *

ARTICLE 4. *Workmanship and Inspection.*

(a) Unless otherwise specifically provided in the job order all workmanship, equipment, materials and articles, and all operational practices of the Contractor used in the performance of the work, shall be the best commercial marine practice and shall be of a suitable grade of their respective kinds. All work performed by the Contractor shall comply

Relevant Provisions of the Master Lump Sum Repair Contract governing the reactivation of the SS MARY AUSTIN (*West* injury)

15. *Drydocking; Miscellaneous.*

(a) On entering and leaving a dry dock or marine railway, the Contractor shall have charge of and be responsible for a vessel not operating under its own power from the time the Contractor's lines are secured to the vessel until such time as all of the Contractor's lines are cast off.

* * * * *

11. *Workmanship, Inspection and Guarantees.*

(a) Unless otherwise specifically provided in the plans or specifications, all workmanship, equipment, materials and articles, and all operational practices of the Contractor used in the performance of a job order or supplemental job order, shall be in accordance with the American Bureau of Shipping rules, the requirements of the Merchant Marine

with the requirements of the American Bureau of Shipping, the United States Coast Guard, and other regulatory bodies in accordance with the rules of said regulatory bodies. * * *

ARTICLE 4. *Workmanship and Inspection.*

* * * * * *

(f) At the request of the authorized representative of the Authority the Contractor shall place reasonable safeguards and shall put and keep at all times sufficient lights to prevent accidents in spaces and areas in which the Contractor will be required to perform or has started work and to provide safe access and egress to and from the vessel.

* * * * *

ARTICLE 9. *Indemnity and Insurance.*

(a) The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property in and about the work, and to the vessel or portion thereof upon which work is done.

* * * * *

Inspection of the Coast Guard, and the best commercial marine practice and shall be of a suitable grade of their respective kinds.

* * * * *

15. *Drydocking; Miscellaneous.*

* * * * *

(i) The Contractor shall place proper safeguards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work.

* * * * *

12. *Indemnity and Insurance.*

(a) The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property in and about the work, and to the vessel or portion thereof upon which work is done.

* * * * *

ARTICLE 4. *Workmanship and Inspection.*	11. *Workmanship, Inspection and Guarantees.*
* * * * *	* * * * *
(c) During the Contractor's performance thereof, the work shall be subject to inspection and test by the authorized representative of the Authority at any and all times and places, and any part of the work may be rejected by said representative of the Authority if not as specified or because of defective workmanship or materials. Any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense.	(c) (i) During the Contractor's performance thereof, the work shall be subject to inspection and test by the Repair Representative at any and all times and places, and any part of the work may be rejected by the Repair Representative if not as specified or because of defective workmanship or materials; any portion of the work so rejected shall forthwith be replaced or corrected by the Contractor at its own cost and expense. * * *
* * * * *	* * * * *
ARTICLE 26. *Default.*	6. *Delays; Termination.*
(a) The United States may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor, terminate the whole or any part of the work covered by a job order in any one of the following circumstances:	(a) If the Contractor is adjudged a bankrupt, or if it makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of its insolvency, or if it persistently or repeatedly refuses or fails (except in cases for which extension of time is provided) to supply enough properly skilled workmen or proper materials, equipment and facilities, or if it refuses or fails to prosecute the work or any part thereof,
(i) If the Contractor fails to perform the work within the time specified in the job order or any extension thereof; or	

(ii) If the Contractor fails to perform any of the other provisions of this contract or the job order issued hereunder, or so fails to make progress as to endanger performance of the job order in accordance with its terms.

* * * * *

with such diligence as will insure its completion on or before the completion date, or if it fails so to complete said work within such time, the Contracting Officer or the Repair Representative may, by written notice to the Contractor and without prejudice to any other right or remedy of the Administrator, terminate the Contractor's right to proceed with the work or such part of the work as to which there has been delay. * * *

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